

**Concern About a Logging
Road Extension and
Wildlife Habitat near Kinbasket Reservoir**

Complaint Investigation 000269



FPB/IRC/60

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The Investigation

In September 2000, the Golden branch of the East Kootenay Environmental Society complained to the Forest Practices Board about a proposed logging road across the Cummins River on the east side of Kinbasket Reservoir in the Columbia Forest District (see attached map.) The complainant asserted that the road will allow a timber transfer to Revelstoke, benefiting that community over Golden, and that the road will have a destructive effect on mountain caribou and grizzly bear populations of the area. Further, the complainant was concerned that the forest development plan (FDP) review and comment process was unfair. The complainant suggested that moving the wood by barge on Kinbasket Reservoir might be in the Crown's best economic and ecological interests.

Background

In July 2000, LP Golden (the licensee) proposed amending its 1999-2003 FDP to include 12 kilometres of new road construction and modification of about 9 kilometres of existing road between the Cummins and Kinbasket rivers. The 21-kilometre road would link existing but non-connecting roads in previously harvested areas, and facilitate a timber transfer to Downie St. Sawmills (Downie) of Revelstoke. The road would allow timber from approved and future cutblocks south of the Cummins River to be trucked north to Downie's private ferry crossing, and then to Revelstoke by highway. A previous licensee from the Golden area had relied on water transport of logs from this area. LP Golden acquired the previous licensee in 1999.

Twenty to 50 caribou use the area east of Kinbasket Reservoir. Southern caribou populations in BC are candidates for threatened or endangered status. Grizzly bears are relatively common in the area and are considered at risk, but not currently threatened.

In 1997, government announced that the Cummins River drainage would become a park, except for a small area near the river mouth, which would be established as a protected area by Order-in-Council. At that time, government decided to include a provision for approval of a road through the protected area to access the lands and resources beyond.

The protected area was not officially established until July 27, 2000, after the licensee had submitted its FDP amendment. Establishment of the protected area changed administration of forest practices in that area from the *Forest Practices Code of British Columbia Act* to the *Park Act*. Therefore, the district manager's approval of the FDP amendment in October 2000 did not include the portion of the proposed road within the protected area (2 of the 21 kilometres of road originally proposed under the amendment). In April 2001, the Minister of Environment, Lands and Parks approved construction of the road within the protected area.

Issues

The Board has no jurisdiction to investigate *Park Act* matters. The Board can only investigate complaints concerned with Parts 3 to 6 of the *Forest Practices Code of British Columbia Act*. The Board does not have jurisdiction to investigate the complainant's concerns about wood flow or economics. The Board investigated complaint issues concerning caribou, grizzly bear and fairness of the public review and comment process.

Relevant Legislation

Forest Practices Code of British Columbia Act

Preamble - Intent of the Code

Section 1 - Definition of forest resources

Section 39 - Public review and comment opportunity

Sections 41(1) and 41(3) - Approval of plans by the district manager

Operational Planning Regulation

Sections 25 to 30 - Public review and comment opportunity

Discussion

The district manager prepared a written rationale to support his decision to approve the amendment. The rationale stated that the Cummins Road FDP amendment was prepared in accordance with the requirements of the *Forest Practices Code of British Columbia Act* and regulations (the Code). The Board confirmed that the FDP amendment was prepared in accordance with the requirements of the Code.

In his rationale, the district manager also stated he was satisfied the amendment would adequately manage and conserve forest resources in the area of the plan. In order to be satisfied, a district manager must have an adequate basis of information on which to support the decision.

The complainant asserts that the district manager's approval was unreasonable given anticipated negative impacts on caribou and grizzly bear habitat.

Was it appropriate for the district manager to be satisfied the FDP amendment would adequately manage and conserve caribou and grizzly bear habitat?

In 1997, government approved an implementation strategy for the Kootenay-Boundary Land-Use Plan, which included separate guidelines for protecting grizzly bear and caribou habitat.

The guidelines for grizzly bear habitat focus on human access management in priority landscape units in the Nelson Forest Region. Priority landscape units are those identified by an October 1997 agreement between the Ministry of Forests (MOF) and the Ministry of Environment, Lands and Parks, now Ministry of Water, Land and Air Protection (MWLAP). The landscape unit containing Cummins Road was not selected as a priority landscape unit for grizzly bear access management, so the guidelines for grizzly bear habitat did not apply to the FDP amendment.

The district manager was aware that three professionals with expertise in caribou and grizzly bear habitat had commented on the proposed FDP amendment.

A MWLAP forest ecosystem specialist reviewed the proposed road north of the Cummins River and supported its location. However, in a later note he also said that for several species including caribou and grizzly bear, further connection of Cummins Road to publicly accessible roads to the south (beyond the Sullivan River to the community of Donald) would be "...extremely undesirable from a wildlife habitat point of view." While he supported Downie continuing to prevent public access on its private ferry, given the area's developing recreational industry, he also suggested the desirability of a road closure to allow industrial use but prevent access to motorized recreational vehicles.

Another MWLAP forest ecosystem specialist objected to the proposed road south of the Cummins River on the basis that connecting the existing roads would damage caribou and grizzly bear habitat by improving human and predator access. He was concerned that the road would result in a direct loss of grizzly bear habitat and an increased potential for bear-human conflict. In addition, he noted the area has little old seral forest and that the road would reduce the effectiveness of developing forest stands to the old-growth condition, which he considered necessary to meet biodiversity guidebook recommendations for that part of the landscape unit.

A regional MOF wildlife habitat ecologist suggested the road could be built with little impact on caribou and grizzly bears, commenting that:

It is clearly understood that the road from Wood Arm [north of Cummins River] will never connect with the Kinbasket Main from Donald. If these roads ever do connect, then the entire Wood Arm would become easily accessible to vehicles and result in much greater use of this relatively wild and remote area.

It is understood that the forests on the Kinbasket face between the Cummins and Kinbasket Rivers are good early winter caribou habitat and will likely be designated as caribou habitat and have the caribou habitat guidelines applied.

The district manager told the Board that he considered each professional opinion but placed substantive weight on the opinion of the MOF regional ecologist, who the district manager believes has the greater expertise in grizzly bear and caribou biology. The district manager also said he was aware of the licensee's response to the review comments.

The licensee had agreed to meet existing caribou guidelines and, if necessary, modify its operations to meet any changes to those guidelines. The licensee had stated that Downie's ferry is for industrial access only and that there are no plans to change that use. The licensee also said there would be no future need for the forest industry to connect Cummins Road to roads south of the Sullivan River.

Retention guidelines are in place within defined caribou habitat areas for the biogeoclimatic zone in which the Cummins Road proposal is located. These guidelines for caribou suggest retaining 40 percent of the operable forest at ages older than 140 years, at least one-quarter of which must be older than 250 years.

In his rationale for approval of the FDP amendment, the district manager found that the caribou habitat guidelines had been reasonably met. At the time of approval, the district manager knew there was a shortfall of retained forest in the caribou habitat zone. Where the caribou habitat guidelines suggest 40 percent of the forest should be greater than 140 years old, only 22 per cent was greater than 140 years old. The district manager told the Board that, from experience, he knew the proposed road would not require much harvesting of mature or old forest. The existing shortfall would not be made worse, and he therefore concluded that the amendment reasonably met the caribou habitat guidelines.

An analysis done at the Board's request revealed that 2 kilometres of new road proposed in caribou habitat (outside the protected area) would require harvesting about five hectares of forest greater than 140 years old. Five hectares worsens the shortfall in caribou habitat by about one-tenth of one percent. (The Board notes that maintenance of caribou habitat in the area east of Kinbasket reservoir is now subject to the *Kootenay-Boundary Higher Level Plan Order*, which provides for recruitment of suitable forest cover where it does not currently exist.) Although incremental loss of habitat is a concern, particularly for caribou, the Board is satisfied the district manager adequately assessed information concerning wildlife habitat prior to approving the plan.

The district manager was aware that control of public access in the area was a significant concern common to the MOF ecologist, two MWLAP ecosystem specialists and the complainant. Although the licensee said Downie would continue to prevent public access on its ferry, the licensee did not include a commitment in its FDP amendment to restrict public access by road as a factor of plan approval.

In his approval rationale, the district manager does not refer to public access, does not impose any constraints on the licensee concerning public access and does not provide information about how government intends to manage this in the future. The district manager told the Board that, in his opinion, the need for construction of a new road connection to the south (across the Sullivan River) would be eliminated by construction of the Cummins Road from the north. That opinion and the expectation that Downie would continue to limit use of its private ferry to industrial traffic satisfied the district manager that public access concerns had been appropriately addressed.

Downie has the discretion to change its policy about use of its ferry at any time. In the Board's view, intent by one licensee, stated by another licensee, is not an enforceable provision under the Code. The district manager could have suggested the licensee include an access provision for Cummins Road within the FDP amendment or, alternatively, he could have applied a condition to approval of the plan. Further, the district manager did not formally record an intention that improvement of public access (such as a connecting road to the south) will not occur in the future.

In the Board's opinion, the district manager did not appropriately follow through with a constraint, requirement or formal commitment to control public access to Cummins Road to the extent necessary to adequately manage and conserve caribou and grizzly bear habitat. Therefore, without assurances concerning public access, it was not appropriate for the district manager to be satisfied the FDP amendment would adequately manage and conserve the forest resources.

Was the decision-making process fair, including review and comment?

The licensee advertised the review period for the FDP amendment on July 12, 2000, and it was available for public review and comment until September 11, 2000. The amendment consisted of tabular road data and maps showing the approximate road location.

The complainant, after reviewing the FDP amendment at the licensee's office, requested additional information from MOF. During those discussions, the district manager became concerned that the complainant's request included economic information that might not be releasable under the *Freedom of Information and Protection of Privacy Act*. The district manager then advised the complainant to apply for information under that act. The complainant was surprised by the formality and felt that MOF was being purposefully difficult. The district manager told the Board that he took this approach to assure compliance with the law concerning the public's freedom to access information and the protection of the licensee's privacy.

MOF and the licensee provided all the requested, releasable information to the complainant, including some not required by the Code during FDP planning. However, it took several weeks. The complainant, aware of the approaching deadline for review and comment, wrote the MOF regional manager to express concern and to request extension of the review and comment period. An extension to September 20 was subsequently granted. Although transfer of information between MOF and the complainant was formal and time-consuming, the Board is satisfied the review and comment process allowed for adequate participation by the complainant.

The regional manager had written the complainant, advising that the district manager anticipated approval on or after September 21. This statement generated the complainant's concern of unfairness. The complainant felt the decision to approve the plan had already been made, regardless of any further comment. The district manager explained to the Board that he interpreted the regional manager's statement to simply indicate the end of the review and

comment period. The Board accepts that explanation, but also understands the complainant's concern.

Government, in creating the protected area at the mouth of the Cummins River, had included a provision for approval of a road across it. The district manager said that a Code decision on the FDP amendment was, therefore, not "if" the Cummins Road would be built, rather "where and how" it would be built.

Though the district manager had insisted that the review, approval and eventual construction of the road would be to Code standards, circumstances resulted in the complainant perceiving the review and decision-making processes as unfairly compromised. This eroded the complainant's confidence in the Code.

The Board confirmed that the FDP amendment was advertised and made available for review and comment, as required by the Code. The district manager reviewed all public and agency comments as well as the licensee's response to those comments. The district manager concluded the licensee had reasonably addressed the concerns raised. In the Board's opinion, the decision-making and review and comment processes were fair, but circumstances diminished the appearance of fairness. This might have been avoided had there been greater effort placed on personal communication among MOF, the complainant and MWLAP staff.

Conclusions

The licensee prepared and submitted the Cummins Road FDP amendment in accordance with the requirements of the Code. However, without assurances concerning public access, it was not appropriate for the district manager to be satisfied the Cummins Road FDP amendment would adequately manage and conserve wildlife habitat.

The decision-making and public review and comment processes were fair, but circumstances diminished the appearance of fairness, and eroded the complainant's confidence in the Code.

Commentary

From the circumstances of this complaint, the Board sees an important lesson concerning approval of plans on the basis of intent. This has particular relevance given government's intent to create a results-based Code.

The Code currently intends that public and referral agency input be considered and incorporated into forest practices through the FDP review and comment process. An inherent feature of the plan approval process is that the public and agencies may not be privy to all the considerations of the Code decision-maker. They must take an approved FDP at face value.

Therefore, it is important that key issues that affect whether forest resources are adequately managed and conserved are reflected in the FDP in an enforceable manner.

Public access control was a key issue for the management and conservation of grizzly bear and caribou. The Board accepts that it was each party's intention that public access to the Cummins Road area would be controlled appropriately. However, in the absence of an explicit reference to this intention, the management of public access is not enforceable under the Code. Public and agency confidence in the Code would have been strengthened if the intention was documented. More importantly, the histories of management decisions need to be fully recorded for the benefit of future forest managers and decision-makers.

Under a results-based Code, it will become increasingly important to specify desired results in unambiguous, enforceable terms.

Recommendations

Control of public access was key to the district manager being satisfied the Cummins Road FDP amendment would adequately manage and conserve caribou and grizzly bear populations. As control of public access was not done through approval of the FDP amendment, the district manager should have taken some other action in conjunction with approval of the amendment to ensure that access is controlled now and into the future.

The Board recommends, in the interest of public understanding and confidence, that government be explicit as to how public access to the east side of Kinbasket Reservoir between Wood Arm and the Sullivan River is to be managed.

In accordance with section 186 of the *Forest Practices Code of British Columbia Act*, the Board requests that the district manager report on the steps taken to implement this recommendation by September 30, 2002.

Location of Complaint 000269 Cummins Road Columbia Forest District

